

1 MACDONALD | FERNANDEZ LLP  
2 RENO F.R. FERNANDEZ III (SBN 251934)  
3 MATTHEW J. OLSON (SBN 265908)  
4 221 Sansome Street, Third Floor  
5 San Francisco, CA 94104-2323  
6 Telephone: (415) 362-0449  
7 Facsimile: (415) 394-5544

8 Attorneys for Creditor,  
9 DAKOTA NOTE, LLC

10 UNITED STATES BANKRUPTCY COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 In Re:  
13 BRUGNARA PROPERTIES VI,  
14 Debtor.

Case No. 17-30501-DM

Chapter 7

**MOTION TO FOR RELIEF FROM  
AUTOMATIC STAY**

(Real Property Commonly Known as 224  
Sea Cliff, San Francisco, California)

Date: February 22, 2019

Time: 9:30 a.m.

Place: Courtroom 17  
450 Golden Gate Ave., 16<sup>th</sup> Floor  
San Francisco, California 9410

Hon. Dennis Montali

18 COMES NOW DAKOTA NOTE, LLC, Creditor herein, which move for entry of an order  
19 for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and (d)(4), and respectfully  
20 represents as follows:  
21

22 **I. FACTS**

23 1. Among the assets of the estate is Debtor's interest in that certain real property  
24 commonly known as 224 Sea Cliff, San Francisco, California (the "Property"). Debtor's former  
25 officer and her family reside at the Property.

26 2. Pursuant to that certain Note dated July 1, 2015 (the "Promissory Note"), in the  
27 original amount of \$1,200,000, Debtor is indebted to Creditor. See Exhibit "A" to the Declaration of  
28 Derald Kenoyer, filed herewith. The loan is secured by a third-priority lien against the Property

pursuant to the Deed of Trust and Assignment of Rents (the "Deed of Trust")), recorded on July 21, 2015, as document number 2015-K093637-00 in the Official Records of the County of San Francisco, California, and attached as Exhibit "B" to the Kenoyer Decl. Thereafter the undivided partial interest of Silicon Valley Funding Group, Inc. were transferred to Creditor. *See* Assignment of Deed of Trust, recorded on April 8, 2016, as document number 2016-K227749-00 in the Official Records of the County of San Francisco, California, and attached as Exhibit "C" to the Kenoyer Decl.

3. The loan matured on January 10, 2016. Additionally, the interest reserve for this loan was exhausted in September 2015, and Debtor never made a single payment required by the Promissory Note.

4. As a result of the foregoing default, The Foreclosure Company, Inc. ("Foreclosure Trustee") was substituted as trustee under the Deed of Trust, and Foreclosure Trustee then commenced a nonjudicial foreclosure (the "Nonjudicial Foreclosure") of the Deed of Trust, and caused to be recorded on February 8, 2018, a Notice of Default and Election to Sell Under Deed of Trust, as Instrument No. 2018030175, in said Official Records (*see* Exhibit "D").

5. As of January 4, 2019, the total amount owing to Creditor from Debtor, including the total unpaid principal balance, all accrued unpaid interest, late charges, foreclosure fees, and related costs and attorneys' fees and related costs incurred by Creditor in connection with the foregoing default was not less than \$1,697,160.15. Kenoyer Decl. at ¶ 9. Debtor has not made any payments to Creditor since that date and the total amount owing continues to grow. Kenoyer Decl. at ¶ 10.

6. Moreover, the Property secures the following liens:

<u>Creditor</u>	<u>Nature of Lien</u>	<u>Amount Outstanding</u>
San Francisco County Taxes	Real Property Taxes	\$54,003.99
Wells Fargo Bank	First Deed of Trust	\$6,518,206.00
Greenfield/NSSMPP	Second Deed of Trust	\$2,692,729.80
Dakota Note, LLC	Third Deed of Trust	\$1,697,160.15
PSG Capital Partners Inc.	Fourth Deed of Trust	\$2,560,000.00
California Home Loans	Fifth Deed of Trust	\$362,500.00
		<u>Total \$13,884,599.94</u>

1           7.       Thus, the total encumbrances against the Property are not less than \$13,884,599.94.  
2 This sum does not include the putative secured claim of the Internal Revenue Service, the California  
3 Franchise Tax Board, and other taxing authorities, arising from proposed assessments of nominee or  
4 alter ego tax liabilities in excess of \$7,800,000.

5           8.       The Property is a seven-bedroom home which is in poor condition. In April 2018, its  
6 present value was estimated at not more than \$15,000,000. *See* Exhibit A to Application to Employ  
7 Broker Anne Herrera [ECF 186].

8                   **Status of the Bankruptcy Case and Related Litigation**

9           9.       As the Court is well aware, this is the fourth in a series of bankruptcy filings by the  
10 Debtor over the past decade. The case was converted to a chapter 7 on March 30, 2018. [ECF 155].

11           10.      The Adversary Proceeding against Dakota Note and associated defendants has been  
12 dismissed. [Adv. Pro. Case No. 17-3049, ECF 59].

13           11.      On November 27, 2017, the PSG Capital Group, Inc. defendants filed a Motion to  
14 Dismiss the adversary proceeding, which has been effectively stayed for more than one year due to  
15 the various main-case motions regarding the appointment of a trustee and the conversion of the case  
16 and the appeal of the conversion order.

17           12.      All efforts by the Trustee to dispose of the Debtor's sole asset, however, have been  
18 stayed by U.S. District Court Judge William Alsup, until resolution of the nominee/alter ego status  
19 as asserted by the taxing agencies. That matter is now off calendar and cannot move forward until  
20 the "Government Shutdown" is resolved. [N.D. Cal. Case No. 17-3071, ECF 62].

21                   **II. ANALYSIS**

22           A.       CAUSE EXISTS TO GRANT RELIEF FROM STAY UNDER § 362(d)(1)  
23                   BECAUSE DEBTOR IS NOT MAKING POST-PETITION PAYMENTS  
24                   AND CREDITOR'S INTERESTS ARE NOT ADEQUATELY  
                      PROTECTED.

25           13.      There is cause to terminate the automatic stay. Bankruptcy Code Section 362(d)(1)  
26 authorizes the Court to modify or terminate the automatic stay for "cause," including lack of  
27 adequate protection. "'Cause' for granting relief from stay has no clear definition and is determined  
28 on a case-by-case basis." *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d  
1162, 1166 (9th Cir. 1990) (citation omitted); *see also Delaney-Morin v. Day (In re Delaney-*

1 *Morin*), 304 B.R. 365, 369 (9th Cir. BAP 2003).

2 14. Specifically, the Court may grant relief from stay for cause when a debtor has not  
3 been diligent in carrying out his or her duties in the bankruptcy case, has not made required  
4 payments, or is using bankruptcy as a means to delay payment or foreclosure. *Western Equities, Inc.*  
5 *v. Harlan (In re Harlan)*, 783 F.2d 839, 841 (9th Cir. 1986) (debtor's failure to make post-  
6 confirmation balloon payment on promissory note—which was to be paid outside of debtor's  
7 confirmed plan and the obligation to make the balloon payment was not modified by the plan—was  
8 cause to grant relief from stay); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432, 435 (B.A.P. 9th Cir. 1985)  
9 (failure to make post-confirmation payments on secured claim constitutes cause to grant relief from  
10 stay).

11 15. Moreover, cause exists where a creditor's interest in its collateral is not adequately  
12 protected. Adequate protection may take many forms, including an equity cushion, *Pistole v. Mellor*  
13 *(In re Mellor)*, 734 F.2d 1396, 1401 (9th Cir. 1984) (20% equity cushion provides adequate  
14 protection), or making post-petition adequate protection payments, 11 U.S.C. § 361(1).

15 16. Here, Debtor's obligation to Creditor has fully matured and is immediately due and  
16 payable. Debtor is making no efforts to repay the secured claim. In fact, despite numerous promises  
17 to dispose of "valuable art" to fund its various plans of reorganization, no such art or cash infusion  
18 has materialized.

19 17. Nor is Creditor's interest in the Property adequately protected. The Property's value  
20 is no more than \$15 million, while the total amount of the claims equal to or senior to Creditor's  
21 claim total \$11,064,939.79 and growing. After accounting for 7% costs of sale (\$1,050,000),  
22 Creditor is left with an equity cushion of \$1,187,900, or 7.92%. The equity cushion is insufficient.  
23 *In re Holt*, No. 09-62439-13, 2010 WL 3294693, \*6 (Bankr. D. Mont. Aug. 20, 2010) (citing cases);  
24 *see also In re McKillips*, 81 B.R. 454, 458 (Bankr. N.D. Ill. 1987) (surveying the cases which show  
25 that an equity cushion of more than 20% is adequate but less than 11% is not). Moreover, the holder  
26 of the first deed of trust has declared a default, further jeopardizing Creditor's interest in the  
27 Property. Debtor is not making adequate protection payments, and it appears that it is not possible  
28 for Debtor to make adequate protection payments.

1 18. Because Creditor's interests are not adequately protected, Debtor has defaulted on his  
2 obligations to Creditor, and Debtor's abuse of the bankruptcy process through repeated filings, cause  
3 exists to grant relief from the automatic stay.

4 ///

5 B. CAUSE EXISTS TO GRANT RELIEF FROM STAY UNDER § 362(d)(2)  
6 BECAUSE DEBTOR HAS NO EQUITY IN THE PROPERTY AND THE  
7 PROPERTY IS NOT NECESSARY TO AN EFFECTIVE  
8 REORGANIZATION.

9 19. The Court should also grant relief pursuant to § 362(d)(2). The first prong of the test  
10 for relief from stay under § 362(d)(2) requires the Court to consider if the debtor or the estate has  
11 any equity in the property. Here, the Debtor has no equity. The total amount outstanding on claims  
12 secured by the Property is not less than \$13,884,599.99 **not including** the taxing agencies' liens of  
13 an additional \$7,800,000 or costs of sale in the amount of not less than \$1,050,000. The present  
14 value of the Property is no more than \$15 million. The Debtor and the estate have no equity in the  
15 Property.

16 20. As to the second prong, the Property is per se not necessary for an effective  
17 reorganization because the present proceeding is a liquidation under Chapter 7, foreclosing any  
18 reorganization of Debtor's affairs. *See Ramco Inds. v. Preuss (In re Preuss)*, 15 B.R. 896, 897  
19 (B.A.P. 9th Cir. 1981). Moreover, Debtor has no operations, no revenue, no other assets, and the  
20 secured debt is growing at more than \$100,000 per month. The Debtor and the Trustee cannot meet  
21 their burden of proving that the property is necessary for an effective reorganization. *United Savings*  
22 *Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375–76 (1988); 11  
23 U.S.C. § 362(g)(2). This case is nothing more than a delay tactic, and Creditor should be afforded  
24 relief from stay.

25 C. CAUSE EXISTS TO WAIVE THE 14-DAY STAY OF ENFORCEMENT  
26 UNDER BANKRUPTCY RULE 4001(a)(3).

27 21. The Court may waive the 14-day stay of enforcement of an order granting relief from  
28 the automatic stay for cause. Fed. R. Bankr. P. 4001(a)(3). Cause exists in this case because of the  
significant prejudice suffered by Creditor who cannot realize on its collateral. Creditor is not an

1 institutional lender, but is a private investor whose collateral remains at risk while the Debtor  
2 remains in possession of the Property. This case—like the ones filed before it—is nothing more than  
3 a delay tactic, and Creditor should be freed to promptly exercise its state-law rights. Hence, the  
4 Court should waive the 14-day stay provided by Bankruptcy Rule 4001(a)(3).

5 **III. PRAYER FOR RELIEF**

6 WHEREFORE, Creditor pray for entry of an order:

- 7 1. Granting relief from the automatic to recover possession of the Property;  
8 2. Granting relief from the automatic on an *in rem* basis for two years starting on the  
9 date of entry of the order for relief;  
10 3. Waiving the 14-day stay of enforcement provided by Bankruptcy Rule 4001(a)(3);  
11 and  
12 4. For such other and further relief as is appropriate in the premises.

13 DATED: February 8, 2019

MACDONALD | FERNANDEZ LLP

14 By: /s/ Reno F.R. Fernandez III  
15 Reno F.R. Fernandez III  
16 Attorneys for Creditor,  
17 DAKOTA NOTE, LLC  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28